

Internal Revenue Service  
MEMORANDUM

INCOME TAX AND ACCOUNTING

Date: MAY 22 1995

To: Chief, Operation Services Branch T:T:O

From: Assistant Chief Counsel (Income Tax & Accounting)  
CC:DOM:IT&A

Subject: ~~Oatman Decision Impact on Form 8270~~, Injured Spouse  
Claim, Processing for Residents of Community Property  
States

This is in reply to your memorandum dated February 15, 1995, requesting our opinion regarding the procedural changes required as a result of the decision in Emily Oatman v. Department of Treasury, 34 F.3d 787 (9th Cir. 1994).

Your memorandum raises the following issues:

(1) Will the Service allow claims filed by injured spouses residing in community property states in which one spouse's debts can be satisfied out of the other spouse's share of community property for the tax year in which a joint overpayment of tax was claimed and subsequently offset?

(2) Will the Service only honor claims for refund of offsets paid to the Office of Child Support Enforcement, or will claims also be allowed for offsets paid to the other agencies covered by the Social Security Act? These agencies include the Public Health Service, the Social Security Administration, and the Health Care Financing Administration. Will the IRS allow claims against all offsets including IRS tax debts and Federal agency non-tax debts?

(3) What explanation should we provide taxpayers if we disallow claims filed for refund of offsets used to pay tax debts or used to pay Federal agency non-tax debts and the taxpayer has cited the Oatman decision?

(4) Should the amount of these claims be allowed for one-half of the joint overpayment amount?

(5) Will the six-year period of limitations apply to all injured spouse claims or does the fact that a claim was previously denied affect the period?

(6) Does the Oatman decision in any way extend the statute for filing an injured spouse claim? The statute is imminent for most of the offsets from processing year 1989. Is this statute

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The Justice Department conceded that under Idaho law a wife's community property share of a refund cannot be permanently taken under the tax refund offset program. Justice stated in its brief that:

...under Idaho law community property is liable for a spouse's separate debts. See Holt v. Empey, 178 P. 703 (Idaho 1919). That fact does not abrogate, however, the non-debtor spouse's interest in community property. Nor does it serve to increase the obligor spouse's interest in that property. Rather, it only means that creditors of one spouse may proceed against community property, including the undivided interest therein of the nondebtor spouse. As between husband and wife, the rule in Idaho is no different than in any of the other community property states--each spouse owns an undivided one-half interest in the community property, regardless of the amounts, if any, of separate debts owed by either spouse. Because these creditor remedies do not operate to negative the IRS's obligation under 42 U.S.C. § 664 to refund to the nonobligor spouse her share of a joint overpayment, and because, in the instant case, the IRS did not allow the claim of the nonobligor spouse seeking her share of the intercepted refund, we agree with her claim that she may seek relief in the courts. Of course, the state child welfare agencies remain free to pursue whatever collection remedies they would otherwise have against a nonobligor spouse.

The Court of Appeals concluded that the taxpayer's suit was not barred by Code section 6402(e), and also set aside the district court's determination, which was based on Holt v. Empey, that the wife's share of the refund can be offset for the payment of the separate debts of the obligated spouse. As noted above, the Justice Department's brief states that the rule applicable in some states whereby one spouse's share of community property can be reached for payment of the other spouse's separate debts relates only to creditors' rights. In the case of past-due child support, the state agency, as creditor, may proceed against the wife's community property.

The provision of law at issue, 42 U.S.C. § 664(a)(1) and (2)(A), provides that upon receiving notice from a state agency that a named individual owes past-due support, the Secretary of the Treasury shall determine whether any amounts, as refunds of Federal taxes paid, are payable to such individual (regardless of whether such individual filed a tax return as a married or unmarried individual). If the Secretary of the Treasury finds that any such amount is payable, he shall withhold from such

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refunds an amount equal to the past-due support, shall concurrently send notice to such individual that the withholding has been made (including in or with such notice a notification to any other person who may have filed a joint return with such individual of the steps which such other person may take in order to secure his or her proper share of the refund), and shall pay such amount to the state agency for distribution.

42 U.S.C § 664(a)(3)(C) states, in part, that:

If the other person filing the joint return with the named individual owing the past-due support takes appropriate action to secure his or her proper share of the refund from which a withholding was made under paragraph (1) or (2), the Secretary of the Treasury shall pay such share to such other person....

Code section 6402(d)(3)(B) provides a procedure for OASDI overpayments that is similar to the procedure set forth in 42 U.S.C. § 664:

(B) NOTICE; PROTECTION OF OTHER PERSONS FILING JOINT RETURNS.-

OASDI (i) NOTICE.--In the case of a debt consisting of an overpayment, if the Secretary determines upon receipt of the notice referred to in paragraph (1) that the refund from which the reduction described in paragraph (1)(A) would be made is based upon a joint return, the Secretary shall--

(I) notify each taxpayer filing such joint return that the reduction is being made from a refund based upon such return, and

(II) include in such notification a description of the procedures to be followed, in the case of a joint return, to protect the share of the refund which may be payable to another person.

(ii) ADJUSTMENTS BASED ON PROTECTIONS GIVEN TO OTHER TAXPAYER ON JOINT RETURN.--If the other person filing a joint return with the person owing the OASDI overpayment takes appropriate action to secure his or her proper share of the refund subject to reduction under this subsection, the Secretary shall pay such

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share to such other person. The Secretary shall deduct the amount of such payment from amounts which are derived from subsequent reductions in refunds under this subsection and are payable to a trust fund referred to in subparagraph (C). (emphasis added)

Section 301.6402-6(i) of the Procedure and Administration Regulations provides a procedure for past-due, legally enforceable Federal debts that is similar to the procedures set forth in 42 U.S.C. § 664 and Code section 6402(d)(3)(B):

Offset made with regard to refund based upon joint return--(1) In the case of an offset from a refund based on a joint return, the Service shall issue a notice in writing to any person who may have filed a joint return with the taxpayer, including the amount and date of any offset and the steps which the non-debtor spouse may take in order to secure his or her proper share of the refund (unless the non-debtor spouse has already taken these steps prior to offset).

(2) If the person filing the joint return with the taxpayer owing the past-due, legally enforceable debt takes appropriate action to secure his or her proper share of a refund from which an offset was made, the Service shall pay the person his or her share of the refund and shall deduct that amount from amounts payable to the agency. (emphasis added)

Section 301.6402-6(i)(2), which is of general application to non-tax Federal debts, contains the same rule as Code section 6402(d)(3)(B)(ii), which applies to OASDI overpayments, and 42 U.S.C. § 664(a), which applies to past-due child support.<sup>1</sup> Therefore, it seems likely that the directive language of section 6402(d)(3)(B)(ii) and § 301.6402-6(i)(2) would result in a court reaching the same conclusion for past-due, legally enforceable debts (including OASDI overpayments) as the Court of Appeals reached for past-due child support in Oatman. That is, § 301.6402-6(i)(2) of the regulations and Code section 6402(d)(3) require the Service to pay the portion of the refund allocable to the nonobligated spouse to such spouse.

A Federal agency, as creditor, can assert a right to the

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<sup>1</sup> The regulations under Code section 6402(c) applicable to past-due child support provide that the amount of an overpayment not subject to offset for any liability for tax or for past-due support shall be promptly refunded to the taxpayer. § 301.6402-5(a)(2) and § 301.6402-5(d)(3).

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nonobligated spouse's share of the joint refund in those states where the community property can be reached for payment of the debts of one spouse. However, we do not believe the Service can assert that right by way of offset under the current rules applicable to the tax refund offset program. We believe that § 301.6402-6(i) (in the case of past-due, legally enforceable debts) and Code section 6402(d)(3)(B)(ii) (in the case of OASDI overpayments), like 42 U.S.C. § 664 (in the case of past-due child support), require the Service to pay the nonobligated spouse his or her portion of the refund. This obligation applies irrespective of any right the Federal agency may have to pursue collection of the debt against the community property of the nonobligated spouse.

Accordingly, the Service may transmit the entire amount of a joint refund (limited to the amount of the past-due legally enforceable debt) to the Federal agency making the claim subject to the requirement to repay the nonobligated spouse his or her share of the refund in the event that the nonobligated spouse files an injured spouse claim. The requirement to repay the nonobligated spouse his or her share of the joint refund is not altered by any right that a creditor may have under state law to reach the nonobligated spouse's share of the joint refund.

Each Form 8379 should be considered on a case-by-case basis to determine the injured spouse's share of the joint refund. The proper method for computing the injured spouse's share of a joint refund is set forth in Rev. Rul. 80-7, 1980-1 C.B. 296, and Rev. Rul. 85-70, 1985-1 C.B. 361<sup>2</sup>. For example, each spouse in a community property state is considered to be the recipient of one-half of the aggregate wages shown on a joint return and is entitled to a credit of one-half of the taxes that are withheld from the wages. In this case, each spouse has a one-half interest in the refund.

The following are our responses to your questions:

(1) The Service should consider all claims filed by injured spouses, including claims in community property states in which the property itself can be reached for the separate debts of the other spouse.

(2) The Service should consider injured spouse claims

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<sup>2</sup> The common law right of offset described in Rev. Rul. 85-70 only applies to tax debts owed to the Service. This common law right of offset cannot be exercised by the Service in the case of past-due child support or past-due Federal debts (including OASDI overpayments).

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involving all offsets, including tax debts, past-due child support, and non-tax Federal debts.

(3) If the injured spouse claim is not allowed because the Service has asserted a right of offset against a tax debt, the explanation should cite Rev. Rul. 85-70. An injured spouse's claim should not be disallowed solely because the nonobligated spouse's refund was paid to the Federal agency to which the obligated spouse owed the debt.

(4) The amount of the injured spouse's share of the refund should be determined according to Rev. Rul. 80-7 and Rev. Rul. 85-70. However, the second step described in Rev. Rul. 85-70 should only be applied in the case of tax debts.

(5) The Service's current position is that the six-year statute of limitations contained in 28 U.S.C. § 2401 applies to injured spouse claims beginning from the date the injured spouse was notified that the debt was applied under section 6402(c) or (d). See G.C.M. 39542, Non-Tax Refund Offset Program, CC:I-039-86 (July 17, 1986). This six-year period of limitations is also reflected in IRM 3(15)(254)6.7. It should be noted that the

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(6) The Oatman decision does not extend the period of limitations for filing an injured spouse claim. The injured spouse is not required to file suit in order for the Service to reconsider a previously denied claim.

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(7) The IRS is not required by law to modify and/or publish any regulations or notices concerning the Oatman decision.

If you have any questions regarding our changes, please contact John McGreevy at 622-7506.

JODY J. BREWSTER

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